No. 11,917

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE H. RICHARDSON,
Appellant,

vs.

THE TRAVELERS INSURANCE COMPANY,
Appellee.

BRIEF FOR APPELLEE.

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On December 13, 1926, appellant was already insured in the Travelers Insurance Company under two policies of insurance, on which he was paying premiums exceeding $500.00 a year. (R. 99; R. 111; R. 24-25.) On that date, he signed an application for an "Insurance Annuity, Age 65, on the Uniform Premium Plan". The principal amount of insurance was $10,000.00. (Plaintiff's Exhibit "A", R. 5.) The premium on the policy applied for was the sum $287.50 per year. (R. 83.) Appellant paid the further sum of forty-eight odd dollars for disability benefits, which are not material to this lawsuit and will not, therefore, be hereafter referred to.

The insurance annuity contract was based upon an insurance unit of $1,000.00 and contained special privileges entitling assured, at age 65, to receive a cash payment of $395.00 for each $1,000.00 of insurance and a paid up contract, payable at death, for $1,000.00. (R. 83-84; Exhibit C, R. 15.) *We repeat, this was the policy of insurance applied for.* The company also issued for a much higher premium, to wit: $467.50 per year for $10,000.00 worth of insurance, a policy known as its "Pension Policy, Age 65". This latter policy was based on an insurance unit of $500.00 and contained a special privilege entitling the assured, at age 65, to receive $739.00 for each $500.00 of insurance and a paid up contract, payable at death, for $500.00. (R. 84; Exhibit B, R. 7.)

Under the insurance annuity, also under the special privilege section, the insured was entitled to receive

for each $1,000.00 of insurance, at age 65, in lieu of all other payments, a cash payment of $1,083.00. Under the pension form policy, in lieu of all other payments, the insured was entitled to receive, at age 65, for each $500.00 of insurance, a cash payment of $1,083.00. (Exhibits B and C, R. 7-14.) Except for the difference hereinabove noted, and except for a difference in the loan value table, the two forms of policy for all practical purposes were, and are identical. (Exhibits B and C, supra).

Appellant did not receive the policy of insurance applied for, to wit: the annuity form policy. Instead, the policy writer, whose duty it was to issue the policy based upon appellant's application, through inadvertence and error, selected the wrong printed form and inserted in the policy actually delivered to appellant the special privilege called for by the pension form policy, including the erroneous insurance unit of $500.00, instead of the special privileges called for by the annuity form policy with the correct and applied for insurance unit of $1,000.00. In all other respects, including the loan value table, the policy delivered to appellant was the annuity form policy for which he applied and which the company intended to issue. (Answer and Counter Claim of Appellant, R. 31-33; R. 87-89.)

Throughout the life of the contract, appellant paid the premium called for by the policy, to wit: the annuity premium, and not the higher pension premium. (R. 77.)

Appellee kept no copies of policies issued by it to its insureds. The only thing kept by appellee is a master form of all the various contracts issued by it, a record of the assured's name, the type of policy which he has and the premium which he is to pay thereon. Nothing in the company's records would disclose the error made in issuing the wrong policy form to an assured. (R. 79-82).

Appellant had assigned the policy, which is the subject matter of this lawsuit, to the Crocker First National Bank of San Francisco. In March of 1946, the bank made inquiry of appellee as to the maturity value of appellant's policy and then, for the first time, the error was discovered. Prompt demand was made by appellee for surrender of the policy in order that the error might be corrected, which demand was refused and then this lawsuit immediately followed for the purpose of correcting the mistake made. (R. 91-93.)

Although the policy was in the hands of the company on several occasions after its issue for loan purposes, the error was not discovered on such occasions because the company's loan division has no connection with its issuing or policy writing division. The table of loan values was correct for the insurance annuity policy, the policy applied for by appellant, and there was no occasion in making loans on the policy to refer to the special privilege section of the policy where the error was located. (R. 93-94; R. 33.)

At the time of applying for the policy, appellant was a duly licensed life insurance agent under contract to appellee herein. (R. 98-99; Plaintiff's Exhibit 4.) On conflicting evidence, the trial court found that appellant had been given definite training with the life manuals of the company and on the subject of life insurance. (R. 109-110.)

At the time of applying for the policy which was issued, appellant was in difficult financial circumstances; he had loans on his pre-existing policies and was having difficulty in paying premiums thereon; he intended to surrender the policies for their cash value and perhaps take out a new one; he was paying in excess of $500.00 per annum on premiums for the policies he then had and the switch to the policy involved herein would result in reducing the premium to $287.50 per year, which was far more in line with appellant's ability to pay; the pension form policy was never discussed. (R. 106-109.)

Based upon the foregoing evidence, the trial court quite properly found that there was such a mistake in the issuance of the policy that appellee was entitled to the reformation it sought.

In his statement of the case, appellant states that he had conversations with appellee's *officers* before exchanging his insurance to its present form. The cited reference to the transcript fails to indicate that these persons were officers of the company; their status, and even their identity is much beclouded; but even if

such conversations did take place, they would be immaterial.

Appellant states that the record does not show that he knew or ever heard of these technical insurance terms, having reference apparently to the terms "$10,000.00 pension policy" and "$10,000.00 insurance annuity". The trial court found to the exact contrary, based on the competent testimony of the witness Whitaker. (R. 109-110.) The trial court also found this to be so because appellant was a duly licensed life insurance agent authorized to sell just the type of policy involved in this case. (See Opinion of the trial court R. 46.)

The statement in the last paragraph on page 3 of appellant's brief, and continuing over to page 4, concerning appellant's insurance experience and training, was rejected by the trial court on the hereinabove referred to competent evidence.

It would be well to state at this point the legal truism that an appellate court is not concerned with conflicts in the evidence. It does serve to illustrate the weakness in appellant's position that he finds it necessary to refer to his own testimony, which the trial court quite properly rejected. In our statement of facts, we have already referred to the policy loans mentioned on page 5 of appellant's brief and have pointed out the testimony showing the separation of the cash and loan values from the special privilege provisions in the policy; no further comment is necessary upon this subject.

THE QUESTIONS PRESENTED.

Although a number of questions were raised in the "Statement of Points" on page 6 of appellant's brief, only three of them are actually discussed in the argument, namely,

1. Is the present action barred by laches;
2. Was the insured prejudiced; and
3. Does the incontestable clause of the policy bar the present proceeding.

Appellant concedes, as he must, that there was sufficient evidence for the trial court to find, as it did find, that there was a mutual mistake in issuing the policy sufficient to entitle appellee to the relief prayed for in the Complaint. (Appellant's Brief, page 14.) For this reason, appellee will offer no argument on that subject in this brief. The other questions hereinabove set forth will be discussed hereafter.

ARGUMENT.

I.

APPELLEE'S ACTION WAS NOT BARRED BY LACHES NOR WAS THE ASSURED PREJUDICED.

Appellee deems it expedient to discuss these questions together.

A. Laches.

Appellee will hereafter have occasion to call this court's attention to a number of cases wherein the defense of laches was raised under factual situations

similar to those presented by the case at bar. However, since this point constitutes one of appellant's main grounds of appeal, some preliminary observations on the subject should not be amiss at this time.

The doctrine of laches is as old as equity itself. In California, there are numerous cases dealing with this subject and some general principles should be observed. The courts of California have said that laches is founded principally upon the equitable maxims "That he who seeks equity, must do equity"; "He who comes into equity, must come with clean hands"; "And the law serves the vigilant, and not those who sleep upon their rights". The propriety of the application of the rules depends upon the conduct and situations of all of the affected parties, not solely upon one.

Smetherhan v. Laundry Workers Union, 44 Cal. App. (2d) 131.

It is fundamental that laches is a defense and the burden of proving the facts from which it may be inferred rests upon the party who invokes the doctrine. In all cases *laches is a question of fact,* on the evidence, and each case becomes largely a law unto itself. In other words, the matter is one which reposes in the sound discretion of the chancellor.

Brown v. Oxtoby, 45 Cal. App. (2d) 702.

Finally it must be borne in mind that the doctrine of laches is to be invoked only where by reason of the plaintiff's acts the allowance of the claim would work an unwarranted injustice.

Long v. Long, 76 Cal. App. (2d) 716.

The bare recitation of the foregoing rules should be sufficient to dispose of appellant's claim as applied to the facts of this case. Turning to the insurance cases, we find a number of them in which reformation was decreed under circumstances at least as favorable to appellee and, in some of them, the circumstances were not as favorable to the person who was held entitled to reformation.

One of the leading cases on this subject is *Columbia National Life Insurance Co. v. Black,* 35 Fed. (2d) 571. The error in the policy in that case was discovered by the company *two months after the policy was issued.* Shortly thereafter, the company sold out to another company, which, although charged with the knowledge of its predecessor, did not in fact know of the error. At the end of twenty (20) years, when the option became available to the assured for the first time (the option being the portion of the policy where the mistake was made), he, the insured, demanded the amount which the mistake gave him. Immediately thereafter, suit was brought to reform the policy. The United States circuit court of appeal, for the tenth circuit, decreed reformation. The defense of laches was interposed and rejected despite the lapse of twenty (20) years in bringing the action. It will be observed that the defense stood on much sounder ground than it does in the case at bar for the reason that the error was discovered two (2) months after the issuance of the policy and no action was taken for twenty (20) years. This case will have to be observed again when we come to discuss the question of prejudice. For that

reason, it will not be referred to at this point any further. It is significant to note, however, that, in the case at bar, the action for reformation was brought within a matter of a very few months after the error was discovered and well within the time prescribed by the law of the State of California, which is that an action for relief on the ground of a mistake may be brought at any time within three (3) years from the accrual of the cause of action. The cause of action is not to be deemed to have accrued *until the discovery, by the aggrieved party, of the facts constituting the mistake. Code of Civil Procedure, Section 338, Subdivision 4.* (Italics ours.)

It should be pointed out to the court at this time that throughout his brief, appellant has completely overlooked the italicized portion of the law hereinabove referred to and this, notwithstanding the fact that the trial court, in its very able memorandum, stated as follows:

> "Finally, laches is raised as a defense. Section 338 of the California Code of Civil Procedure has no bearing. The limitation there prescribed, by the expressed wording of the statute, does not begin until discovery of the mistake. Mere lapse of time may not constitute laches which will bar reformation, 'particularly where the party seeking reformation has been ignorant of the defect which he seeks to have corrected'. 44 C.J.S. 1116."

In *Prudential Insurance Co. of America v. Deane* (Delaware) 27 Atl. (2d) 365, the company did not discover the mistake in the policy for twenty (20) years,

during which time the assured paid all of the premiums. The court decreed that the company was entitled to have the policy reformed, notwithstanding the lapse of twenty (20) years. In so doing, the court used the language cited by the trial court in its memorandum decision below as follows:

> "No prejudice to respondents from the delay of twenty years, nor 'change of situation during neglectful repose' have been demonstrated. Complainant is willing that the insured should have all for which he bargained and paid. In consequence, the defense of laches must fail."

It is to be observed that the cited case is strikingly similar to the case at bar.

In *Buck v. Equitable Life Insurance Society* (Wash.), 165 Pac. 878; 96 Wash. 683, the action to rectify the mistake was held properly brought and reformation was decreed even at the end of fifteen (15) years.

In *Youngs v. Metropolitan Life Insurance Co.,* 28 Ohio NPNS 179, reformation was decreed despite the lapse of twenty (20) years.

In *Berry v. Continental Life Insurance Co.* (Mo.) 33 S.W. (2d) 1016; 224 Mo. App. 1207, reformation was granted after twenty (20) years.

In *New England Life Insurance Co. v. Jones,* 1 Fed. Supp. 984, where the error was not discovered until the assured's death six (6) years after the issuance of the policy, reformation was decreed.

In each and all of the foregoing cases, the company, through error of its scrivener or some employee of the company, had erroneously inserted something in the policy for which the assured did not apply or pay. In some of the cases cited, the assured loudly asserted that he knew of no mistake on his part. Had the appellant in this case raised the question on appeal that there was no mistake, it would have been necessary to analyze the mistakes made in the respective cases at some length and call to this court's attention the disposition made of those claims. However, the cases have been cited to this court on the sole proposition that the defense of laches was interposed and rejected in each of them. As has already been observed, the facts in some of the cases were much weaker on the question of laches than those in the case at bar.

It was uncontradicted that appellee had no actual knowledge of the mistake in the case at bar until the matter was called to its attention by the Crocker First National Bank of San Francisco in March of 1946. The action in the case at bar was filed on August 19, 1946, within six (6) months after the discovery of the error and after negotiations with the assured to have him submit the policy for voluntary reformation had failed. How it could be said that appellee was guilty of laches under such circumstances is inconceivable.

We turn now to the argument and authorities submitted on this subject by appellant. We observed in the first instance that the burden of establishing the defense of laches was upon appellant and that laches is a question of fact. Even if it be assumed that the

evidence would have supported a finding of laches, which we cannot in view of the record, still the trial court's finding on this subject could not be disturbed by an appellate court. Again the defense of laches, it must be remembered, is based upon the equitable principle that he who seeks equity must do equity. This principle works both ways. By his very resistance of this action for reformation, appellant refuses to do equity; he seeks instead to receive from appellee a sum in excess of $10,000.00, for which he neither applied nor paid and he bases his right to recovery upon the fact that appellee, admittedly by mutual mistake, inserted such a provision in the policy of insurance actually issued to him.

The principal argument on this subject is based upon the fact that the policy was in the hands of appellee at the time of its issuance and also for loan purposes on four (4) separate occasions. The trial court found in the very finding cited by appellant (Finding 16, R. 55, et seq.) that, although the policy was in appellee's hands, it discovered no error in said policy while completing any loan thereon, and found specifically in said finding that appellee's first knowledge of the mistake was in March of 1946.

The tryer of the facts, the trial court in this instance, might have been impressed with an argument such as is made by appellant on this subject, namely, that because the policy was in the hands of one branch of the company which had nothing to do with its issuance, it should, nevertheless, have discovered the mistake, but that was an argument to be addressed to the tryer

of the facts in the trial court. The trial court in this case, quite properly we submit, found to the contrary, and adopted appellee's position that this was a separate branch of the company, that in making a loan on the policy it had no occasion to refer to the special privilege section thereof, and, therefore, it was not constructively chargeable with such knowledge. In any event, the argument is specious when addressed to an appellate court, which is unconcerned with either conflicting facts or conflicting inferences which may be drawn from admitted facts. There is nothing in the entire record to indicate, even as a question of fact, that appellee had any knowledge of the admittedly mutual mistake until March of 1946, after which it acted in the manner prescribed by both law and equity. It is submitted that the trial court quite properly held that the California statute of limitations did not begin to run until the discovery of the admittedly mutual mistake in March of 1946. Its findings in this respect are not only supported by the evidence, but are, indeed, the only reasonable findings which could have been made on the subject.

The authorities cited by appellant cannot assist him.

The first of these is *Yablon v. Metropolitan Life Insurance Co.,* (Ga.) 38 S. E. (2d) 534. Why appellant cited this case to this court on the subject of laches appellee cannot understand. On page 9 of his brief, appellant quotes the language of the Georgia Appellate Court to the effect that the question of laches in that case was one of fact and "did not justify the direction of a verdict that the company

had been so guilty". The case went off on the proposition that the evidence did not show such a mistake as is relievable in equity, and further that the insured was so ignorant that he could not have been aware of the mistake if one was made. Since there is no question raised concerning the mistake in the case at bar on this appeal, it is difficult to see how the *Yablon* case is in point at all.

Although appellant, on page 14 of his brief, states, "Frankly, we do not think there was any mutual or other mistake in issuing the policy, *but refrain from arguing the point* only in view of the adverse findings of the trial court," it is difficult to know upon what proposition the language from 32 Corpus Juris 1142, etc. is quoted for (page 10, Appellant's Brief), except on that proposition. All of the cases cited by appellee on the question of laches held that there was a mistake such as entitled the insurance company to relief and such is the general law. (See Couch's Cyclopedia of Insurance Law, Section 392.) Every mistake is in some sense the product of negligence, but equity has uniformly relieved from mistake in a proper case. Appellee does not contest the general propositions set forth by appellant on pages 10 and 11 of his brief, but simply submits they are inapplicable in view of the findings and authorities hereinabove cited.

Appellant seems to argue on page 11 of his brief that, because a person is chargeable with knowledge of the contents of a written contract signed by him, therefore, such a contract is not subject to reforma-

tion. This proposition is untenable and the authorities cited by appellant in support of it do not so hold. If this proposition were correct, no written contract would ever be subject to reformation. In each of the cases cited by appellee, a written contract of insurance was held subject to reformation. To state that a person has been negligent in issuing a contract in a particular manner makes him guilty of laches, is to beg the question.

The next cited case is *Metropolitan Life Insurance Company v. Asofsky,* 38 Fed. Supp. 464. In that case, the company claimed a mistake in the premium called for by the policy in that it was based upon age 60 and not age 65, the assured's age. Plaintiff conceded that the assured had no knowledge as to the amount of the premium, which was never discussed during the solicitation for the policy. The subject of laches is not even discussed in the opinion and the case goes off on the sole issue that the mistake was unilateral and there was no fraud or inequitable conduct on the part of the insured. That there has been bilateral mistake and fraud and inequitable conduct on the part of appellant is settled by the findings and the evidence in this case. It is true, as stated on page 12 of appellant's brief, that there was no fraud in connection with the original issue of the policy or with any of the policy loans. The situation in connection with the policy loans has already been completely disposed of heretofore and it would serve no useful purpose to reiterate in detail the complete separation of the loan and underwriting departments of appellee at this time.

The remaining argument, on page 12 of appellant's said brief, completely overlooks the issues in the case. Appellee can think of no better answer to give appellant than that which has already been given by the trial court as follows:

> "I think the evidence required a finding of mutual mistake * * * It is incredible that defendant (appellant) did not familiarize himself with the special privileges. He was not a novice in the business world. He admits that he read the policy, apparently shortly after he received it * * * I am satisfied that he read these provisions and, if he did read them, he must have realized that a mistake had been made. He was an agent of plaintiff (appellee), authorized to write just such policies * * * He was aware that his company could not issue generally the policy which was issued and remain in business. No other conclusion comports with the facts. * * *
>
> "*He knew that he applied for a different kind of policy than the one delivered.* He must have known the benefits appurtenant to such a policy, both at the time he signed the application and at the time he received the policy. The discrepancies between the two are great. The policy revealed to him a patent error.
>
> "The conclusion reached is that defendant (appellant) *did notice the error but kept it to himself.*" (Italics ours. R. 45-47.)

The foregoing language of the trial court likewise is a complete answer to the argument made in the last paragraph of appellant's brief commencing on page 12.

The next cited case is *Dutton v. Prudential Insurance Co.,* (Mo.) 193 S. W. (2d) 938. Once again we are faced with the citation of a decision which does not even discuss the question of laches. The case is apparently cited for the proposition stated on page 12 of appellant's brief that there must be certainty of error before reformation will be granted. That there is such certainty in the case at bar can hardly be disputed. In the cited case, there was no evidence of any mistake whatsoever and it was quite properly held that no reformation would be granted.

On page 13, appellant states that there was no evidence that the wrong printed form of policy was selected in the case at bar. It is submitted that, in the statement of facts, appellee has set forth the evidence from which the trial court could draw no other inference whatsover and apparently appellant concedes the point on page 14 of his brief and seeks instead to avoid the result of such a mistake by pleading laches. We have already commented on the *Dutton* and *Yablon* cases cited at this point. The case of *Hayes v. The Travelers Insurance Company,* 93 Fed. (2d) 568, is also cited. This was another case where there was a finding of no mistake; the case does not turn on the question of laches at all.

Finally, appellant cites the case of *Kaufman v. New York Life Insurance Co.,* (Penn.) 172 Atl. 306. This is another case where the question of laches was not even discussed. Although the court refused reformation, the case is in reality an authority in support of appellee's position. It reviews the decisions which we

have heretofore cited on the question of laches, not on that question, but on the question of mistake for which proposition appellant apparently is citing the case. For example, referring to *Columbia National Life Insurance Co. v. Black,* supra, a case relied upon by appellee herein, the court said:

> "As the court clearly pointed out, there was a patent and manifest absurdity on the face of the policy, a reformation was consequently allowed to rectify the error."

The reason the court refused reformation in the Kaufman case was because the discrepancy was so small; the mistake in that case made a difference of but $420.00. In the case at bar, it makes a difference in excess of $10,000.00. The smallness of the mistake in the *Kaufman* case was the sole reason the court refused to grant reformation. The court, in the *Kaufman* case, admits that, where the mistake is so great that the assured must have recognized the error, reformation will be decreed upon the ground that a mistake by one party, coupled with knowledge thereof by the other, affords a basis of equitable relief. The court said:

> "It has been held with obvious justice that a mistake by one party and knowledge of the mistake by the other, will justify the relief as fully as mutual mistake."

On page 15, appellant claims that he is ignorant. The language of the trial court heretofore quoted will serve to illustrate the futility of this position.

Although, as we have already observed, appellant apparently abandoned in this court his claim that there was no mistake cognizable by a court of equity, he has seemingly blown hot and cold on this subject. In one breath he says he refrains from arguing the point in view of the adverse findings of the trial court; in the next, he cites cases involving mistake and loudly proclaims innocence. For that reason we carefully invite the court's attention to the cases which we have heretofore cited on the proposition that there was no laches involved in the case at bar. In each of them, the court will find that there was a mistake, sometimes infinitely smaller than that presented here and we feel it particularly appropos to quote the language of the United States Circuit Court of Appeal, for the Tenth Circuit, in the case of *Columbia National Life Insurance Co. v. Black,* supra, as follows:

> "While courts are properly reluctant to alter the terms of a written engagement, even in equity, and do not do so unless the proof is clear and convincing, we are of the opinion that the uncontradicted and indisputable facts in this case require the interpostion of equity. It is true the defendant on the stand and in his letters denies any mistake on his part. But his actions speak louder than his words. He applied for an ordinary life policy; without any quibble, and in response to his application, he received a policy that manifestly was in error. He only paid for an ordinary life policy. When he received the policy he either did or did not notice the error. If he did not notice it, the mistake was mutual. If he did notice it and said nothing, he was guilty of

such inequitable conduct as to amount to fraud. A man presents a check for $100 to a bank teller; he gets two $100 bills. No matter how loudly he asserts the lack of mistake on his part, the fact still remains that he was either mistaken or was trying to benefit by the teller's mistake. Without resorting to any oral evidence, the papers in this case on their face bear conclusive proof of a mistake that can be and should be corrected in equity."

Throughout his entire brief, but principally in connection with his discussion on the question of laches, appellant has made frequent reference to appellee's negligence. For that reason, we deem it appropriate to quote the following language from *Columbia National Life Insurance Co. v. Black,* supra:

"It is claimed that the company was negligent in failing to discover the error, and attention is called to a statment on the policy reading: 'Examined by J. M. S.' Apart from the question whether negligence must be accompanied by prejudice, it is sufficient to say that negligence is not in itself a defense, else there would be no ground for reformation for mistake, as mistakes nearly always presuppose negligence."

B. There was no prejudice to the insured.

In a very brief paragraph on page 16, the appellant claims that he was prejudiced. This argument is fully answered by the case of *Columbia National Life Insurance Co. v. Black,* supra, as follows:

"It is true that the plaintiff in error, or its predecessor, knew of this error for 20 years, and

> brought no action to rectify it. It does not appear that the defendant was prejudiced by this delay. The defendant testified that, because he held this policy, he let others lapse; but he cannot seriously contend he lapsed these other policies on the hope of some day getting more than he asked for or paid for from this policy; and if he did, and is disappointed, the prejudice results not from the delay but from his illbegotten hope."

Appellee submits that the prejudice argument is clearly specious.

II.

THE PRESENT ACTION IS NOT BARRED BY ANY STATUTE OF THE STATE OF CALIFORNIA.

It has already been pointed out that Section 338 of the California Code of Civil Procedure gives a period of three years from the *time of the discovery* by the aggrieved party of the facts constituting the fraud or mistake within which a person may legally bring an action for relief. The present action was brought well within that time.

III.

THE INCONTESTIBLE CLAUSE DOES NOT BAR THE PRESENT ACTION.

The futility of appellant's position is well illustrated by the argument made on this subject. Originally, in the trial court, he abandoned this defense. The incontestable clause of a policy means exactly

what it says, that is, no action which has for its purpose the contesting of the policy may be brought after the time for a contest elapses. But an action for reformation is not an action to contest the policy, it is an action to affirm the policy and to correct a mistake in it. There is no question of avoidance of the policy. The policy is not being contested and this is the feature which distinguishes the case at bar from the cases cited in appellant's brief.

Appellant in his brief has not cited a single case to this court holding that an action for reformation constitutes a contest of the policy within the meaning of the incontestable clause. These cases will be noted shortly.

The point has been directly passed upon that an action to reform a policy *is not* a contest within the meaning of said clause. In *Columbia National Life Insurance Co. v. Black,* 35 Fed. (2d) 571, 577, the policy applied for and the one issued each contained an incontestable clause similar to that which is now before the court. The only express saving portion of the clause was non-payment of premiums exactly as in the case at bar. The court held that the reformation action was not an action to contest the policy within the meaning of the clause and, in so doing, stated as follows:

> "Both the policy applied for and the one issued provide, in substance, that 'after one year from date hereof this policy shall become incontestable,' save for nonpayment of premiums. It is claimed that this provision bars this action. The conten-

tion is not sound. *This is not a contest of the policy but a prayer to make a written instrument speak the real agreement of the parties.* It would hardly be suggested that an assured, who brings an action to reform a policy and to recover under it as reformed, was contesting the policy within the meaning of this clause. Yet the clause is not one-sided, and the right of the assured to have the writing express the agreement actually made is no greater than the right of the assurer. We have found no authority upon the point, although there are many decided cases involving the construction and scope of the clause. Reference is made to Mack v. Connecticut General Life Ins. Co. of Hartford, 12 F. (2d) 416 (8 C.C.A.); Myers v. Liberty Life Ins. Co., 124 Kan. 191, 257 P. 933, 55 A.L.R. 542; Scales v. Jefferson Standard Life Ins. Co., 155 Tenn. 412, 295 S.W. 58, 55 A.L.R. 537, and the Annotation in 55 A.L.R. 549, for general discussions of the clause. Without going at length into the purpose and history of the clause and without intimating that an actual contest may not be found under the cloak of reformation, *we hold that an action to correct a purely clerical error in a policy issued, so that it will speak the truth as to the agreement of the parties, is not barred by the incontestable clause.*" (Italics ours.)

In *Mates v. Penna. Mutual Life Insurance Co.,* (Mass.) 55 N.E. (2d) 770, decided by the court as late as June 1, 1944, the same defense was urged under a similar incontestable clause and a number of cases were cited. The following language would seem to be most persuasive:

"The plaintiff contends that that provision makes it now too late for the defendant to show the mistake. In our opinion, the correction of the policy to express the true agreement is not contesting the policy within the meaning of that provision. See Columbia National Life Ins. Co. v. Black, 10 Cir., 35 F. (2d) 571, 71 A.L.R. 128; Equitable Life Assurance Society v. Rothstein, 122 N. J. Eq. 606, 195 A. 723, affirmed 123 N. J. Eq. 591, 199 A. 43; Neary v. General American Life Ins. Co. 140 Neb. 756, 1 N.W. (2d) 908. See also Reagan v. Union Mutual Life Ins. Co., 189 Mass. 555, 76 N. E. 217, 2 L. R.A., N. S., 821, 109 Am. St. Rep. 659, 4 Ann. Cas. 362."

Appellee has no quarrel with the cases cited by appellant on this subject. They are all cases involving an attempt by the company to avoid payment on the policy at all, as distinguished from cases which attempt to make the policy speak the true agreement of the parties. The principal case relied upon by appellant on this subject is *Dibble v. Reliance Life Insurance Co.,* 170 Cal. 199. This was an action to *cancel the policy* for false representations and statements. The policy was, in fact, being contested. In the case at bar there is no deception; the company seeks to give the assured exactly what he applied for and what he paid for; nothing more, nothing less. The language heretofore cited from the *Black* and *Mates* cases, supra, constitute a complete answer to the argument made on pages 21-24 of appellant's brief.

IV.

THE TRIAL COURT'S OPINION.

The trial court's opinion is attacked. The learned trial judge gave to this case the most careful consideration and rendered an opinion herein which shows a complete knowledge and understanding of the facts and the law applicable thereto. That opinion is contained in the record which is before this court and needs no defense from appellee herein. We must observe, however, that the attack made upon it is wholly unwarranted.

CONCLUSION.

In conclusion, it is submitted that appellant has cited no authority to this court which would even remotely justify it in disturbing the trial court's judgment. The facts clearly show, as found by the trial court, both a mutual mistake, as evidenced by the application for the policy of insurance and also upon such a patent and obvious mistake, that it would be a fraud upon the part of the appellant to insist upon the performance of the policy according to its written, but unapplied for and unpaid for, terms. The record shows quite conclusively that appellee acted seasonably to assert its rights. To permit appellant to prevail in this case would amount to his enrichment in a sum exceeding $10,000.00, for which he neither applied nor paid. The trial court quite properly held that he would not be allowed this unjust profit.

Finally, equity has consistently ruled that he who seeks equity must do equity. Is it doing equity to insist upon receiving more than $10,000.00 without paying for it? The trial court's judgment should be affirmed in its entirety.

Dated, San Francisco, California,
October 25, 1948.

Respectfully submitted,
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